No. 90-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS CIPOLLONE,

Petitioner,

v.

LIGGETT GROUP INC., A Delaware Corporation;
PHILIP MORRIS INCORPORATED, A Virginia Corporation;
and LOEW'S THEATRES, INC., A New York Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENTS IN RESPONSE TO THE SUPPLEMENTAL POST-ARGUMENT BRIEF OF PETITIONER

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Petitioner evidently has abandoned the distinction—between tort law and other types of law—on which his argument against preemption of state law has heretofore rested, a withdrawal that is entirely appropriate given the holdings of this Court that tort duties do constitute "requirement[s] or prohibition[s] . . . imposed under State law" (§ 1334(b)). *See, e.g., San Diego Building*

Trades Council v. Garmon, 359 U.S. 236, 244, 246-47 (1959) (describing general tort duties as "requirements imposed by state law" that plainly regulate conduct); *see also* Resp. Br. at 28 & n.32. Although he no longer denies that the preempted field includes the judicial imposition of liability (*see* Supp. Br. at 2), petitioner now seeks to introduce several new distinctions into the statute for the purpose of narrowing its preemptive scope. These efforts are equally unavailing.

Petitioner first argues that Section 1334(b) uses the words "based on smoking and health" in what he calls an "asymmetrical" manner—so that a "prohibition" on misstatements is "based on smoking and health" only if it rests on a smoking-specific "norm," while a "requirement" of an additional warning is "based on smoking and health" regardless of whether it rests on a smoking-specific "norm." This argument is flatly contradicted by the words of the statute. Section 1334(b) is *not* asymmetrical, but perfectly symmetrical: it treats "requirement[s]" and "prohibition[s]" identically. As a pure textual matter, therefore, the phrase "based on smoking and health" cannot be given a different meaning depending on whether the State seeks to impose a "requirement" or "prohibition." And petitioner's need to distinguish requirements from prohibitions in Section 1334(b) thus disproves his interpretation of the phrase "based on smoking and health."

In any event, the meaning that petitioner now attributes to the phrase is inherently unnatural. When a State tells a cigarette company what it may or may not say about the effects of smoking on health, that command is "based on smoking and health," regardless of the "ultimate" source of the "norm," or whether the State does so through its legislature, through its agencies (promulgating a smoking-specific rule or adjudicating a case under a general statutory norm), or through its courts (applying general or specific standards). *See, e.g., Garmon*, 359

U.S. at 244 & n.3 (general tort law and labor-specific statutes treated the same); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987) (preemption under "relates to" phrase in ERISA applies to common law tort and contract causes of action, and is not limited to state measures designed to address the subject of ERISA). Moreover, there is a perfectly apparent explanation for the presence of "based on smoking and health" in Section 1334: rather than introducing some awkward concept of generality, Congress simply intended to ensure that preemption reached only standards for cigarette advertising and promotion that were "health-related" (*see* S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969)), and not (for example) those requiring an accurate statement about the number of cigarettes in a package or the price.

Petitioner also attempts to limit preemption by giving some sort of undefined but narrow meaning to the words "package," "advertising," and "promotion" in Section 1334. But this effort not only deprives the words of their most natural meaning, it separates the preemption provision from the statute as a whole and, most particularly, from the goals that Congress—in Section 1331, again unmentioned by petitioner—declared as its objective. The language of Section 1334 is intended to bar States from imposing their own obligations with respect to those channels through which cigarette companies communicate to the public—packages, advertising, and promotional campaigns (such as mailings). Given that purpose, it is simply irrational to attribute to Congress, as petitioner does, the intent to leave States nonetheless free to regulate (through *any* means, including statute, agency rule, or judicial decision) what the cigarette companies say or do not say to consumers about smoking and health, provided that the States try to characterize their efforts as directed to some other (unspecified) methods of communication. It seems even more irrational when it is recognized that such regulation would produce the very results—each State's resetting the *federal* balance among

various national policies and imposing excessive burdens, producing confusion, and generating disuniformity—that Congress expressly rejected in the field covered by the Cigarette Labeling and Advertising Act.

Respectfully submitted,

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